IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4261 of 2001
in
CRIMINAL MISC. APPLICATION NO. 2810/2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GIRISHBHAI ARUNBHAI DESAI

Versus

STAE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 4261 of 2001
MR AD SHAH for Petitioner No. 1
Mr S J Dave Addl.. PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 03/07/2001

C A V JUDGEMENT

Rule. Mr S J Dave, learned Addl. Public

Prosecutor waives service of rule for the State. By consent of the learned Advocates for the parties, this matter is being heard and disposed of.

2. This is an application for bail under section 439 of the Criminal Procedure Code, 1973 (for short, 'the Code') read with section 167 (2) thereof. The petitioner has been arrested in UMRA police station in connection with C.R. No.I.79/2001 involving offences including offence punishable under Section 304 of IPC on 2.3.2001. The petitioner alleges that despite the expiry of the period of 60 days from the date of his arrest, the charge-sheet was nota filed against him and hence he is entitled to be released on bail under section 167(2) of the Code. He, therefore, prays for his release on bail in the aforesaid offence.

3. Mr S J Dave, learned APP has objected to the grant of this application. It is his contention that the trial court has dismissed a bail application of the petitioner and hence the petitioner is required to file Criminal Revision Application under section 397 of the Code and that an application for bail under section 439 of the Code is not maintainable. Now as regards bail, all courts have concurrent jurisdiction and hence, when the sessions court has dismissed a bail application, it is not necessary for the petitioner to file Criminal Revision Application against that order in order to challenge the same.

4. It is next contended that this Court had earlier decided that the petitioner should move the proper court of competent jurisdiction for default bail under section 167(2) of the Code. That, instead of going to the Magisterial Court, the petitioner went to a wrong court, i.e. Court of Sessions. That therefore, the petitioner may go back to the Magisterial Court even now. This does not appear to be a ground taken before the Sessions Court and that Court does not appear to have dealt with that issue. If the petitioner is otherwise entitled to a default bail, it is not proper or necessary to send him back to the Magisterial Court. It cannot be said that only a Magisterial Court can decide this issue and not this Court.

5. Therefore, these two grounds deserve to be rejected.

6. Then we can turn to the provision made in section 167(2) of the Code. It reads as follows:

"167(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that -

(a) The Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding--

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police."

7. At times, it is being argued that charge-sheet has already been filed in the competent court and at that time, an application for the enlargement of the accused was already pending and was not disposed of, and, therefore, when the charge-sheet has already been filed

at the time when such an application under section 167(2) is being considered, the accused is not entitled to get bail under section 167(2) of the Code. This argument stands negatived by the decision of the Hon'ble Supreme Court in Uday Mohanlal v. State of Maharashtra reported in 2001 (2) GLR 1148. It has been laid down therein that a right to be released on bail for want of submission of charge-sheet within the time stipulated in section 167 of the Code is an indefeasible right of being released on bail when the charge-sheet is not filed within the time stipulated and this right would not stand defeated if a charge-sheet is filed pending bail application under section 167(2) of the Code. In other words, a bail application under section 167(2) of the Code cannot be dismissed on the ground that a charge-sheet has been filed subsequently after filing of bail application under section 167(2) of the Code.

8. Therefore, though the charge-sheet has been filed subsequent to the filing of a bail application under section 167(2) of the Code, it would not stand as an impediment in the way of the petitioner.

9. We can now turn to the consideration of the provision made in section 167(2) of the Code. For practical purpose, it can be divided into two parts, i.e. the offence punishable with death or life imprisonment or imprisonment for a term not less than ten years and the other offences. In the case before us, the offence punishable under section 304 of IPC is the subject matter for our consideration. It reads as follows:

> "304. Punishment for culpable homicide not amounting to murder - Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death or of causing such bodily injury as is likely to cause death;
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> or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act ais done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

10. Though, this section 304 of IPC, does not have

two parts, it has been divided into two parts for practical purposes, i.e. section 304 Part (I) and section 304 Part (II). It is a known position that when intention is imputed, the offence would fall under section 304 part I of IPC. On the other hand, when knowledge is imputed, the offence would fall under section 304 Part II of IPC. In other group of cases, similarly situated, it was made clear on the part of the State of Gujarat that the offence would fall under section 304 Part II and not under section 304 part I. There is no reason to depart or deviate from that position in the case. Therefore, I take it that the present case involves the offence punishable under section 304 Part II.

11. On a bare reading of part II of section 304 IPC referred to hereinabove, it is clear that for this offence punishment provided is as follows:

"imprisonment of either description which may extend to ten years or with fine or with both"

12. Here an attempt was made to argue that this offence is punishable for ten years and hence, right of bail would be acquired after 90 days and not after 60 days of arrest. This argument stand negatived by a decision of the Supreme Court in Rajeev Chaudhary v. State reported in 2001 AIR SCW 2210. There the offence involved was one punishable under section 386 of IPC. The punishment for that offence is similar to one provided for in section 304 of IPC with a difference that section 386 of IPC provides for compulsory jail sentences whereas section 304 of IPC provides for an option also. The important observation of the Supreme Court in this decision contained in the last para of this judgment may be reproduced for ready reference as under:

"6. From the relevant part of the aforesaid sections, it is apparent that pending investigation relating to an offence punishable with imprisonment for a term "not less than 10 years", the Magistrate is empowered to authorise the detention of the accused in custody for not more than 90 days. For rest of the offences, period prescribed is 60 days. Hence in case, where offence is punishable with imprisonment for 10 years or more, accused could be detained upto a period of 90 days. In this context, the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment

could be imprisonment for a clear period of 10 years or more. Under Section 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. Further in context also if we consider Clause (i) of Proviso (a) to section 167(2) it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life, and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under section 386 of the IPC imprisonment can vary from from minimum to maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years."

13. Similar view was adopted in Sreeragam v. State of Kerala, reported in 2001 Cri.L.J. 1944.

14. After the above interpretation of section 167(2) of the Code, there remains no room for any doubt and it becomes very clear that the offence punishable under section 304 of IPC will fall in the second part of proviso to section 167(2) of the Code. In that right to bail would arise on completion of 60 days from the date of arrest and the accused cannot be detained for ninety days, when the investigation relates to offence punishable under section 304 of IPC, without charge-sheet.

15. In view of the aforesaid two decisions of the Supreme Court, which are directly applicable to the present case, the petitioner is entitled to bail under section 167 (2) of the Code as his arrest was made on 2.3.2001 and charge-sheet was admittedly not filed within sixty days thereof.

16. In the facts and circumstances of the case, this application is allowed and the petitioner is ordered to be released on bail in connection with C.R. No.79 of 2001 with UMRA Police Station for offences punishable under sections 304,338,337, 420 etc. of IPC on his executing a personal bond in the sum of Rs.50,000/(Rupees Fifty thousand only) with one surety of the like amount to the satisfaction of the lower court and subject to the conditions provided he is not required in judicial custody for any other case:

CONDITIONS:

(1) The petitioner shall make himself available for interrogation by a police officer as and when required

(2) The petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;

(3) The petitioner shall not leave Gujarat State without the prior permission of the Court;

(4) On every 1st date of English Calendar month during the period from 10 am to 5 p.m. the petitioner shall appear before PSO of UMRA police station, and shall mark his presence for which the learned Sessions Judge, Surat shall write a Yadi directing PSO of UMRA police station to keep and maintain a written record for such presence marked by the petitioner;

(5) The petitioner shall furnish his their true and correct complete address of his residence as well as the work place where he will stay for the period from date of his release on bail to date of conclusion of trial of the case, both to the I.O. and learned learned Sessions Judge, Surat supported with affidavit;

(6) In case of any change in his address he shall immediately inform the learned Sessions Judge,Surat about such change in address of residence;

(7) The petitioner shall surrender his passport to PSO of UMRA police station, if any.

The learned Sessions Judge, Surat_ shall examine and check all the documents which may be produced by a person who wants to stand as surety for petitioner for his satisfaction as to whether that person is in fact solvent or not and thereafter, it will be his judicial discretion that he may accept or refuse that person as surety for the petitioner.

Bail bonds be executed before the learned Sessions Judge, Surat.

If any one or more conditions are reported to have been breached by the petitioner, the learned Sessions Judge, Surat shall be at liberty to issue non-bailable warrant against the petitioner.

Rule is made absolute accordingly. D.S. is permitted.

Date: 3.7.2001. [D P Buch, J.]
msp